



C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8  
Édifice C.D. Howe, 240, rue Sparks, 4<sup>e</sup> étage Ouest, Ottawa (Ont.) K1A 0X8

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### Reasons for decision

Unifor,

*applicant,*

*and*

Nasittuq Corporation,

*employer,*

*and*

International Brotherhood of Electrical Workers,  
Local 1541,

*interested party.*

Board File: 30128-C

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International Brotherhood of Electrical Workers,  
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*interested party.*

Board File: 30149-C

Neutral Citation: 2014 CIRB 706

January 7, 2014

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### **Counsel of Record**

Mr. Anthony F. Dale, for Unifor;

Mr. Steven P. Williams, for Nasittuq Corporation;

Ms. Cynthia D. Watson, for International Brotherhood of Electrical Workers, Local 1541.

[1] On September 16, 2013, Unifor (Unifor or the union) applied to the Canada Industrial Relations Board (the Board) for certification to represent a unit of employees of Nasittuq Corporation (Nasittuq or the employer) working at CFS Alert on Ellesmere Island in Nunavut (Board file no. 30128-C). On September 30, 2013, the International Brotherhood of Electrical Workers, Local 1541 (IBEW 1541) filed an application pursuant to sections 18.1 and 35 of the *Canada Labour Code (Part I—Industrial Relations)* (the *Code*) in which it claimed that the Nasittuq employees working at CFS Alert are covered by a certification order that had been issued to it in August 2003 and are subject to the IBEW 1541's collective agreement with Nasittuq (Board file no. 30149-C).

[2] The Board, composed of Ms. Elizabeth MacPherson, Chairperson and Messrs. Robert Monette and Norman Rivard, Members, considered the two applications together pursuant to section 20 of the *Canada Industrial Relations Board Regulations, 2012* (the *Regulations*). On November 22, 2013, the parties were advised that Unifor's application for certification had been granted and the IBEW 1541's application had been dismissed. These are the reasons for those decisions.

### **I. Background**

[3] In 1985, the governments of Canada and the United States of America agreed to upgrade the then existing North American air defence system known as the Distant Early Warning (DEW) Line. The agreement provided for the replacement of the DEW Line with the North Warning System (NWS). The Government of Canada is responsible for managing the NWS and initially contracted with Frontec Logistics Corporation (Frontec) to perform this function.

[4] In April 1999, the IBEW 1541 was certified by the Board to represent specifically identified operations and maintenance employees working on the NWS (Board Order no. 7560-U). Frontec later partnered with a Joint Venture known as the Pan Arctic Inuit Logistics Corporation. Nasittuq was created as the Joint Venture's agent, and in 2001 it was awarded a 10-year contract to manage the NWS. In August 2003, the IBEW 1541's certification order was updated to reflect that Nasittuq Corporation had become the employer (Board Order no. 8519-U). The bargaining unit represented by the IBEW 1541 was defined as:

All North Warning System (NWS) Operation and Maintenance (O&M) employees in classifications listed in the attached Schedule A.

[5] Under its NWS contract with the Government of Canada, Nasittuq maintains and operates 47 radar sites from five logistics support sites (LSS) located in Inuvik, Iqaluit, Goose Bay, Cambridge Bay, and Hall Beach. Nasittuq also has employees at the NWS Control Centre and the NWS Support Centre, both co-located with the NORAD operations centre in North Bay, Ontario. Nasittuq's headquarters are in Ottawa, Ontario, where it also maintains a Contract Management Office (CMO). The Schedule to the IBEW 1541's certification order lists some 42 job titles, including administrative, technical and support personnel who work and live at the NWS LSS sites.

[6] In addition to its contract for the operation and maintenance of the NWS, Nasittuq has a separate contract with the Government of Canada to provide site-support services, program management and administrative support for the maintenance and operation of CFS Alert, located on the north-eastern tip of Ellesmere Island, Nunavut. This site is arguably the most isolated workplace in Canada and access to it is tightly controlled by the Canadian military. CFS Alert has a broad mission: while its core tasks are signals monitoring and interpretation and activities in support of Canadian arctic sovereignty, it also provides a base for military regional operations, search and rescue, and national and international science projects. CFS Alert receives its command, control and logistical support from 8 Wing, Trenton, Ontario. The activities and operations at CFS Alert do not form part of the NWS.

[7] Nasittuq was awarded the Ellesmere Island contract in early 2012, and commenced its operations there in September 2012. The services it provides had previously been supplied by another contractor, Canadian Base Operators (CBO), and when it took over the contract, Nasittuq

hired a number of former CBO employees. By September 2013, Nasittuq had some 51 employees assigned to CFS Alert.

[8] In April 2013, the IBEW 1541 formally notified Nasittuq in writing that, in its opinion, it held bargaining rights for employees performing the work at CFS Alert by virtue of its certification order for the NWS employees. Nasittuq disagreed with IBEW 1541's interpretation of its certification order, and asserted that the operations at Ellesmere Island are separate and do not form a part of the NWS, nor do the employees working at CFS Alert fall within the classifications listed in the Schedule to the IBEW 1541's certification order. On September 30, 2013, the IBEW 1541 filed an application with the Board seeking an order declaring that it represents the Nasittuq employees working at CFS Alert and in the CMO in Ottawa by virtue of the certification order it holds covering the NWS employees. In the alternative, IBEW 1541 applies under sections 18.1 and 35 of the *Code* for a declaration that Nasittuq's CFS Alert contract and the NWS contract are a common undertaking or work and consequently adding the CFS Alert employees to its existing certification order.

[9] In the meantime, Unifor applied to the Board on September 16, 2013 for certification to represent a unit composed of the Nasittuq employees working at CFS Alert (Board file no. 30128-C). The evidence provided to the Board demonstrated that Unifor is the successor to the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and that it has the support of a majority of employees in the proposed bargaining unit.

[10] The issue for the Board was whether the Nasittuq employees working at CFS Alert fell within the scope of the IBEW 1541's pre-existing certification order, and if not, whether the IBEW 1541's application for a bargaining unit review and declaration of single employer or Unifor's application for certification of the Nasittuq employees working at CFS Alert should be granted.

## II. Positions of the Parties

### A. IBEW 1541

[11] The IBEW 1541 contends that it should be recognized as the bargaining agent for the Nasittuq employees working at CFS Alert. It asserts that Unifor's application to represent these employees is not properly before the Board and should not be considered.

[12] The IBEW 1541 alleges that Nasittuq originally offered to voluntarily recognize it as the bargaining agent for the CFS Alert contract employees, but subsequently changed its position. It asserts that Nasittuq is increasingly requesting members of its bargaining unit to work at the CMO in Ottawa and at CFS Alert. In its view, all of the employees performing the functions listed in its certification order are within the scope of the bargaining unit that it represents, regardless of where they are located. The IBEW 1541 states that, when non-unionized CMO employees are assigned to do bargaining unit work at NWS sites, the employer remits union dues for the work performed. The IBEW 1541 also alleges that recently, the employer has more frequently transferred unionized employees to work temporarily at the CMO, but admits that this is permitted under the collective agreement.

[13] The IBEW 1541 traces its representation rights in respect of NWS employees back to a November 1963 certification issued by the Canada Labour Relations Board to IBEW Local 2085 for a unit of employees of the Federal Electric Corporation operating the DEW Line. That certification order applied to employees in specified classifications employed within Canada on DEW Line sites.

[14] The IBEW 1541 argues that although Nasittuq is the contractor for two separate contracts in different locations, the Board should not allow the complexity of this business arrangement to prevent the IBEW from acting as the exclusive bargaining agent for all of Nasittuq's employees.

[15] It suggests that section 35 of the *Code* can be applied to this situation and asserts that the three businesses at issue are the NWS contract in Northern Canada, the NWS CMO in Ottawa and the CFS Alert contract in Nunavut. All of these contracts serve the same federal client, the Department of National Defence, and all are operated by Nasittuq. It asserts that the employees at each location perform many of the same functions and the employer regularly transfers

employees between locations. The IBEW 1541 submits that the partition of the contracts is artificial and is a ruse to prevent unionization.

[16] In the alternative, the IBEW 1541 submits that section 18.1 of the *Code* could be used to review the bargaining unit structure and thereby add the CFS Alert employees to the NWS employees' bargaining unit. It submits that a declaration is necessary to ensure that IBEW 1541's current bargaining rights are preserved, and that it makes good sense to have labour relations streamlined under one bargaining agent.

#### **B. Unifor**

[17] Unifor contests the IBEW 1541's application, suggesting that it is an attempt to expand the bargaining rights of the IBEW 1541 at the expense of the expressed desire of the Nasittuq employees working at CFS Alert to be represented by Unifor.

[18] Unifor states that there is no basis on which to make a common employer declaration as requested by the IBEW 1541 or to review and expand the IBEW 1541 bargaining unit by means of a bargaining structure review. It notes that the examples that IBEW 1541 provided to support its allegation of interchangeability of employees between sites all took place prior to the date on which Nasittuq assumed the contract at CFS Alert. It suggests that the IBEW 1541 did not attempt to organize the employees working at CFS Alert nor did it make a timely application to enforce the bargaining rights it claims to have once it knew of the employer's decision not to recognize the IBEW 1541 as bargaining agent for the CFS Alert employees.

[19] Unifor disputes the IBEW 1541's contention that its existing bargaining rights are threatened. It submits that IBEW 1541 will remain the bargaining agent for the unit described in Order no. 8519-U, namely employees working under Nasittuq's NWS contract. It asserts that the CFS Alert contract does not threaten the NWS bargaining unit in any way and that the IBEW 1541's bargaining rights will continue as before. Unifor argues that section 35 of the *Code* does not apply in the circumstances of this case, as there is only one employer, Nasittuq. The fact that Nasittuq carries on business in more than one location under more than one contract does not result in the existence of separate employers.



[20] With respect to the IBEW 1541's application under section 18.1 of the *Code*, Unifor points out that the existing bargaining unit structure is composed of a single bargaining unit, namely that represented by the IBEW 1541. It asserts that no facts have been put forward to support the contention that this structure is no longer appropriate for collective bargaining. Unifor also asserts that the IBEW 1541 has not provided any evidence that it has the support of a majority of the employees working at CFS Alert.

[21] Unifor submitted its own application for certification to represent the Nasittuq employees working at CFS Alert, which it contends is timely as these employees are currently unrepresented. The membership evidence submitted with the application demonstrates that a majority of the employees in the unit proposed by Unifor wish to have it as their bargaining agent.

### **C. Nasittuq**

[22] Nasittuq confirms that it currently has two separate contracts with the Government of Canada: one for base operations at CFS Alert and one for maintenance and operation of the NWS. It states that the CFS Alert contract is in no way related to the NWS contract.

[23] Nasittuq advises that there are 140 employees in the NWS bargaining unit represented by the IBEW 1541 and 51 employees currently working in Unifor's proposed bargaining unit at CFS Alert. Employees working on the NWS contract are a mix of community based employees and employees who rotate in and out of the work site from their homes elsewhere. From the ISS, these employees access the radar sites via helicopter to perform scheduled maintenance and respond to unforeseen situations. In contrast, all CFS Alert contract employees are rotational, flying into and out of the site on military aircraft from CFB Trenton. They provide site support and management services, including food, accommodation and janitorial services, transportation support, vehicle, road and grounds maintenance and building and infrastructure management. Nasittuq employees at CFS Alert do not engage in radar maintenance or operations.

[24] Nasittuq also operates separate contract management offices for the NWS and CFS Alert contracts. The NWS CMO is in Ottawa, Ontario and employs 95 staff who are responsible for providing direction and oversight for the NWS contract, including logistical support and business

services. Nasittuq contends that the work of the CMO employees is not the same as that performed by the IBEW 1541 members. It submits that there have been very few instances of employee movement between the CMO and the NWS sites in the north. In half of the ten temporary assignments in the past four years, CMO employees were deployed as a last resort to perform bargaining unit work when no bargaining unit personnel were available. In the other five cases, Nasittuq alleges that the CMO employees were sent to perform non-bargaining unit work. Nasittuq submits that the limited assignment of CMO employees to northern locations is an arrangement that has existed between the parties for many years and has in no way diminished work opportunities for bargaining unit members. The CMO for CFS Alert is located in Belleville, Ontario.

[25] Nasittuq denies that it ever offered to voluntarily recognize the IBEW 1541 as the bargaining agent for employees working at CFS Alert, although it admits that during the 2010 round of collective bargaining it had indicated that it would consider collaboration with the IBEW 1541 with respect to unspecified future contracts or business ventures. After Nasittuq secured the CFS Alert contract in May 2012, discussions regarding possible voluntary recognition took place, but Nasittuq indicated that it needed time to understand the operation before it would be able to consider voluntary recognition of the IBEW 1541. When the IBEW formally approached Nasittuq in April 2013, the employer advised it that Nasittuq would not voluntarily recognize it as the bargaining agent as the employer felt that the employees should make their own decision about unionization. The IBEW 1541 submitted a policy grievance on July 4, 2013, which Nasittuq denied by letter dated July 17, 2013. Nasittuq states that the IBEW did not submit the grievance to arbitration and therefore it considers the grievance to have been abandoned.

[26] Nasittuq points out that the scope of the bargaining unit set out in the IBEW 1541's certification order is limited to specific positions involved in the operation and maintenance of the NWS. It submits that the IBEW 1541's bargaining unit thus does not extend to the employees working at CFS Alert. It asserts that there is only one employer involved in both contracts, and therefore section 35 of the *Code* does not apply to the circumstances of this case. It also submits that the IBEW 1541 has not met the onus of showing that there are compelling reasons why the existing bargaining unit structure, which is currently comprised solely of the NWS bargaining



unit, is no longer appropriate for collective bargaining and therefore should be subject to review pursuant to section 18.1 of the *Code*.

[27] Furthermore, Nasittuq asserts that there is no labour relations purpose to be served by a section 35 declaration or a section 18.1 bargaining unit review. It points out that the purpose of these provisions is to prevent the erosion of bargaining rights through complex corporate arrangements. In this case, none of the mischief that these sections are designed to prevent has arisen or is threatened. It suggests that if the IBEW 1541 wishes to represent the Nasittuq employees at CFS Alert, it should organize them and apply for certification in accordance with the provisions of the *Code*. Nasittuq asks that the IBEW's application be dismissed.

[28] Nasittuq takes no issue with the composition of the bargaining unit proposed by Unifor, but suggests that a representation vote would be appropriate, given the competing claims by Unifor and the IBEW 1541. It submits that employees should feel that they have had a direct say in union representation by way of a vote.

### III. Analysis and Decision

[29] It is well known that this Board and its predecessor, the Canada Labour Relations Board, have had a preference for "all employee" bargaining units. However, in a recent decision, *Servisair Inc. and Servisair Deicing Services Inc.*, 2013 CIRB 692, the Board explained the criteria that considers when determining the appropriate scope of a bargaining unit in various circumstances:

[49] It is well established that the Board has exclusive jurisdiction to determine the appropriate bargaining unit in any given case (*Royal Aviation*, 2000 CIRB 69). In undertaking this responsibility, the Board is not required to determine the ideal unit, or even the most appropriate unit, but only an appropriate unit (*National Bank of Canada* (1985), 58 di 94; 11 CLRBR (NS) 257; and 86 CLC 16,032 (partial report) (CLRB no. 542)). Consequently, the determination of the appropriate bargaining unit is more of an art than a science. As the Board stated in *CFTO-TV Limited* (1981), 45 di 306 (CLRB no. 345), the decision must be based on the facts and circumstances of each particular case:

There is nothing that the Board can say in this case regarding appropriate bargaining unit determination that has not already been said in countless decisions emanating from labour relations boards throughout the years. The variety of "criteria" and "considerations" only goes to prove that bargaining unit configurations cannot be "carved in stone". Standard industry type units can be created that will suit most applications but there will always be the exceptions where circumstances will dictate

variations and even inconsistencies. In such cases, bargaining units must reflect the special circumstances and be determined according to the merits of each case. ...

(pages 310-311)

[50] Factors considered by the Board in making its determination regarding the appropriateness of a bargaining unit include community of interest; viability of the unit; employee wishes; industry practice or pattern and the organizational structure of the employer. Although the Board has expressed a general preference for wider-based bargaining units, which it believes promote administrative efficiency, convenience in bargaining and industrial stability, the Board will often deviate from that expressed preference. For example, when seized with an application for certification of a newly organized bargaining unit, the Board will favour factors that increase access to collective bargaining and may certify units that consist of a subset of the occupations present in the workplace, even if such groupings are not optimal from the view point of the employer's organizational structure. As the Board stated in *G4S Secure Solutions (Canada) Ltd.*, 2012 CTRB 625:

[48] ... While the Board has expressed a preference for wider-based units, there is no automatic presumption in favour of large units. The Board will certify a smaller unit, if necessary to give effect to the employees' constitutionally guaranteed right to freedom of association. To achieve this objective, the Board may certify a local rather than regional or national bargaining unit, even if this causes some administrative inconvenience to the employer. The Board's decision on the appropriateness of a bargaining unit will generally be upheld unless a court considers it clearly irrational (see *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd.*, [1996] 2 S.C.R. 432).

[51] In cases where collective bargaining is well established and the parties have longstanding relationships, the Board may place greater emphasis on factors other than access to collective bargaining. In *Sécur Inc.*, 2001 CTRB 109, the Board indicated:

[60] The question of reconfiguring the units is not exempt from the fundamental objectives of the *Code* of which the Board is required to establish the practical side. Accordingly, the reconfiguration of bargaining units must promote the employees' exercise of the rights conferred by the *Code* while enabling the business to be operated properly. The Board must therefore deal with a reconfiguration with a sufficiently long-term vision to contribute to the development of relations between the bargaining agents and the employer with regard to the proposed units. While considering these general principles, the Board will nonetheless take into account the specific facts of each application.

[30] For reasons that are lost in the mists of time, the IBEW 1541's existing certification order is not an "all employee" one. Instead, the scope of the IBEW 1541's representation rights in respect of Nasittuq employees is limited to specific positions involved in the maintenance and operation of the NWS. Accordingly, the Board cannot agree with the IBEW 1541's contention that the employees hired by Nasittuq for the purpose of fulfilling its contract for CFS Alert or providing operational support services at the NWS CMO in Ottawa are subject to Board Order no. 8519-U.

[31] It has been a longstanding principle of this Board that, when a bargaining agent wishes to add new classifications to an existing bargaining unit, it must organize employees in the

classifications to be added and demonstrate that it has a double majority — i.e., that it has majority support among the employees to be added as well as among those in the existing unit (see *Telegraph Canada* (1979), 32 di 270; [1979] 3 Can LRB 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198)). No evidence was filed to suggest that the IBEW 1541 has the support of a majority of employees at either the NWS CMO or at CFS Alert.

[32] With respect to the IBEW 1541's alternative application that the Board should apply section 35 and/or section 18.1 of the *Code* to the circumstances of this case, the Board cannot agree.

[33] The Board has established five well known criteria that must be met before it will consider making a declaration of single employer under section 35 of the *Code* (see *Murray Hill Limousine Service Ltd. et al.* (1988), 74 di 127 (CLRB no. 699)):

1. that there be two or more enterprises (businesses)
2. both under federal jurisdiction;
3. that are associated or related;
4. of which at least two, but not necessarily all, are employers; and
5. which are under common control or direction.

[34] Even when the Board finds that these five criteria have been met, it has discretion as to whether a declaration of single employer should be issued. In *S.V.N. Enterprises Ltd., doing business as S & K Trucking et al.*, 2003 CIRB 219, the Board set out the principles that inform its decisions as to whether a labour relations purpose would be served by a single employer declaration:

[54] The Board will only grant a declaration under section 35 if the declaration will serve a labour relations purpose. The Board's decision in *Air Canada et al.* (1989), 79 di 98; 7 CLRB (2d) 252; and 90 CLLC 16,008 (CLRB no. 771) provides useful guidance when considering whether a labour relations purpose would be served by a single employer declaration:

The purpose of section 35 has always guided the exercise of the Board's discretion in these matters. That purpose is aimed at preventing the undermining or evading of bargaining rights through corporate or business arrangements (see *British Columbia Telephone Company and Canadian Telephones and Supplies Ltd.*, *supra*; and *Beam Transport (1980) Ltd. and Brentwood Transport Ltd.* (1988), 74 di 46 (CLRB no. 689)).

Section 35 is not aimed at enhancing existing bargaining rights (*British Columbia Telephone Company and Canadian Telephones and Supplies Ltd.*, *supra*). Its purpose is remedial in nature. It is designed to ensure that employers only distinct in appearance do

not succeed in circumventing their obligations under the *Code* by resorting to corporate restructuring or other types of business arrangements:

"... It was, after all, to prevent a management from escaping collective bargaining obligations owed under one corporate entity by transferring work to another controlled entity that Parliament put section 133 [now section 35] into the statute. ...

(*Bradley Services Ltd. et al.* (1986), 65 di 111; 13 CLRB (NS) 256; and 86 CLJC 16,036 (CLRB no. 570), pages 126, 272, and 14,432)"

Section 35 is not aimed at exempting a bargaining agent from having to organize an otherwise genuinely distinct group of employees. In some cases, the issuance of a declaration by the Board may have that effect, but that is not its purpose. When the Board addresses the issue of discretion, **the question ceases to be whether common control exists; it becomes whether common control contributes to the erosion of bargaining rights.**

(pages 118-119, 271; and 14,098; emphasis added)

[35] Despite the IBEW 1541's effort to characterize the NWS and CFS Alert contracts as separate enterprises or businesses, the Board cannot agree. In the Board's opinion, there is only one enterprise, Nasittuq, which employs the workers who provide services under the terms of the two contracts with the Government of Canada. There is no evidence to support the IBEW 1541's allegation that the contracts were split in order to avoid unionization. Nor is there any evidence that the IBEW 1541's bargaining rights in respect of the NWS employees have been eroded or in any way threatened by the manner in which the contracts are structured. Accordingly, the Board dismisses the IBEW 1541's application under section 35 of the *Code*.

[36] Through its suggestion that section 18.1 of the *Code* should be applied in this case, the IBEW 1541 is essentially seeking to obtain by another route that to which it has no legitimate claim by virtue of its existing certification order, namely to expand the scope of its current bargaining unit. Section 18.1 of the *Code*, like section 35, is not aimed at exempting a bargaining agent from having to organize and obtain the support of employees it wishes to represent.

[37] The IBEW 1541 presented no evidence to support the notion that either the current or the proposed bargaining unit structure is or would not be appropriate for collective bargaining (see *Rogers Cablesystems Limited*, 2000 CIRB 51). The onus was on the applicant to persuade the Board that the bargaining units are no longer appropriate for collective bargaining and it failed to do so. Accordingly, the Board declines to conduct a bargaining unit review pursuant to section 18.1 of the *Code*.

[38] For all of these reasons, the Board dismissed the IBEW 1541's application.

[39] Having determined that the Nasittuq employees working at CFS Alert were not subject to the IBEW 1541's certification order, the Board then considered Unifor's application to represent these employees. The Board found the bargaining unit proposed by Unifor to be appropriate for collective bargaining and determined that a majority of the employees in the unit wish to be represented by Unifor. Accordingly, pursuant to section 28 of the *Code*, the Board issued certification Order no. 10500-U to Unifor on November 22, 2013.

[40] This is a unanimous decision of the Board.

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Elizabeth MacPherson  
Chairperson

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Robert Monette  
Member

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Norman Rivard  
Member